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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

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MAR 26 2004

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary in the United States as a research assistant professor. The director determined that the petitioner had not established that it had offered the beneficiary a qualifying, permanent position.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Regulations at 8 C.F.R. § 204.5(i)(3) state that a petition for an outstanding professor or researcher must be accompanied by:

(i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition . . . ;

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field . . . ; and

(iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

Pursuant to regulations at 8 C.F.R. § 204.5(i)(2), "permanent," in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

The petitioner submits a job offer letter from Dr. David J. Bayless, associate director of the petitioner's Coal Research Center. Dr. Bayless states that the job offered "is a permanent, full time position," but he also states "[m]ost research positions at [the petitioning] University are approved on an annually renewable basis. . . . It is expected that your appointment will be renewed indefinitely on an annual basis, provided you continue to perform your duties satisfactorily and provided research funding continues at the expected level."

The director denied the petition, stating "the petitioner had offered the beneficiary term employment for a period of one year. . . . The offer establishes that the appointment is of a term rather than permanent nature, subject to expiration if not formally renewed by the University. The employer has made it clear that renewal of the appointment is not automatic but contingent on specified conditions. . . . An appointment that would expire, unless the employer takes active steps to continue it, cannot reasonably be deemed to be permanent."

On appeal, the petitioner indicates that a brief and/or evidence will be forthcoming within thirty days. To date, more than five months later, the record contains no further correspondence, and we will consider the record to be complete as it now stands.

Dr. Alan W. Boyd, on behalf of the petitioner, states on appeal "I believe an administrative error has occurred, since the officer could have asked for additional evidence to settle the question without summary denial." CIS regulations at 8 C.F.R. § 103.2(b)(8) instruct the director to issue a request for evidence "in instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility." The same regulation states "[i]f there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence." Thus, if the initial evidence, on its face, shows evidence of ineligibility, there is no need or requirement to request additional evidence. In this instance, the director construed the petitioner's language regarding renewable one-year appointments as evidence of ineligibility – evidence which, on its face, shows that the job offer does not meet the regulatory requirements.

Dr. Boyd maintains that the beneficiary's "position of Research Assistant Professor should be considered permanent, meaning having indefinite ending and supported for the foreseeable future." Dr. Bayless, in a new letter, states that the director's "interpretation has resulted from wording in her contract that said the position was dependent on performance evaluation and funding availability." These assertions do not address the fundamental basis for the director's finding. The director, in the notice of decision, clearly stated that the

finding of ineligibility rests on the assertion that the appointment was for a period of one year, subject to annual renewal. Thus, the petitioner has not appointed the beneficiary to a permanent position. Rather, the petitioner has offered the beneficiary a one-year appointment, which can be renewed at the petitioner's option in additional increments of one year. The job offer shows an ending date for the appointment (June 30). The petitioner has the option of extending the appointment, but the available evidence indicates that the petitioner also has the option of not extending it. The fact that the job offer letter contains the word "permanent" is not controlling, if the same letter describes terms which are plainly not consistent with permanent employment.

The petitioner has submitted nothing to show that the annual contract renewal is automatic, requiring no action on the part of the university administration, or that the university must show cause for termination in order to allow an annual contract to lapse without renewal. Therefore, the available evidence indicates that the petitioner *could* terminate the beneficiary's employment without cause, simply by failing to renew the annual contract. The expectation of continued employment required by the regulation must derive from the nature of the employment agreement, rather than on the employer's informal assurance that it intends to keep renewing the beneficiary's contract.

In the denial notice, the director indicated that the evidence of record "is not sufficient to establish that [the beneficiary] has the level of international recognition required for this visa classification. The record also calls into question whether the petitioner has the ability to pay the beneficiary's proffered wage." The director did not discuss these issues in any detail, stating that the finding that the beneficiary's position is not permanent is, by itself, sufficient to warrant denial of the petition. This assertion is consistent with 8 C.F.R. § 103.2(b)(8), cited above, because the denial was based on evidence of ineligibility, notwithstanding a lack of required initial evidence.

The director did not elaborate on the finding that the petitioner has not established the beneficiary's international recognition, and the petitioner, on appeal, has offered no rebuttal to this finding. On appeal, Dr. Bayless asserts that the Coal Research Center has received millions of dollars in grant funding and therefore "it was not and will not be a problem to pay [the beneficiary's] salary for the foreseeable future." The director's assertion regarding ability to pay is very vague, and therefore it is not clear what questions, exactly, exist concerning the petitioner's ability to pay. Nevertheless, the director did not cite this as a primary basis for denial. Rather, the director denied on the basis that the beneficiary's employment is not permanent, and mentioned other grounds almost in passing.

The initial submission indicates that the petitioner has offered the beneficiary a renewable one-year appointment, rather than a permanent position of inherently indefinite duration. The petitioner, on appeal, has not refuted this finding. Therefore, we affirm the director's finding that the petitioner has not extended a qualifying offer of permanent employment, and the petition therefore may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.